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RESTORATION HARDWARE, INC. and GARY FRIEDMAN  
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10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION  
13

14 EMECO INDUSTRIES, INC.,

15 Plaintiff,

16 v.

17 RESTORATION HARDWARE, INC., GARY  
FRIEDMAN, and Does 1-10,

18 Defendants.  
19

Case No. 3:12-cv-5072 MMC

**DEFENDANTS' MOTION FOR  
ADMINISTRATIVE RELIEF TO  
FILE SURREPLY IN SUPPORT OF  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR PRELIMINARY  
INJUNCTION**

1 Defendants seek leave to file the surreply attached hereto as Exhibit 1 and the supporting  
 2 declaration of Hal Poret attached as Exhibit 2. This surreply is in support of Defendants'  
 3 Opposition to Plaintiff's Motion for Preliminary Injunction.

4 In its reply brief, Plaintiff mischaracterizes both the survey of Mr. Hal Poret that  
 5 Restoration Hardware submitted in opposition to the preliminary injunction motion and the legal  
 6 framework in which it fits. These mischaracterizations confuse the issues and deserve a response.  
 7 For example, Plaintiff mischaracterizes Mr. Poret's survey in this case as a secondary meaning  
 8 survey, and then argues that a secondary meaning survey is inapplicable to incontestable  
 9 registered marks. In fact, Mr. Poret's survey is a *confusion* survey, *not* a secondary meaning  
 10 survey, and therefore is applicable to incontestable registered marks. Plaintiff also attached to its  
 11 reply papers Mr. Poret's testimony from a prior case to make it appear as if he has criticized the  
 12 approach he used in this case, ignoring that the different marketplace conditions in the two cases  
 13 necessitated different approaches.

14 Defendants respectfully submit that a brief surreply is justified, and necessary to assist the  
 15 Court in resolving Plaintiff's motion by correcting and clarifying the record. This Court has  
 16 granted motions for leave to file surreplies in such situations. *Toomey v. Nextel Commc'ns, Inc.*,  
 17 Case No. C-03-2887 MMC, 2004 U.S. Dist. LEXIS 30793, at \*2 (N.D. Cal. Sept. 23, 2004)  
 18 (granting motion for leave to file surreply to address arguments "raised for the first time in  
 19 [defendant's] reply, and purported misstatements of fact in [defendant's] reply."); *Sharper Image*  
 20 *Corp. v. Consumers Union of United States, Inc.*, Case No. 03-4094 MMC, 2004 U.S. Dist.  
 21 LEXIS 24484, at \*2 n.1 (N. D. Cal. Feb. 23, 2004) (granting motion for leave to file surreply and  
 22 considering to extent surreply "responds to arguments raised for the first time" in reply).  
 23 Defendants request that the Court grant leave to file a brief surreply of five pages, supported by a  
 24 similarly brief declaration from Mr. Poret responding to the attacks on his survey.

25 Defendants sought Plaintiff's stipulation to the filing of a surreply and supporting  
 26 declaration, but Plaintiff's counsel indicated that Plaintiff would oppose such request.  
 27 (Declaration of Wesley E. Overson in Support of Defendants' Motion for Leave to File Surreply ¶  
 28 2.)

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2 Dated: December 6, 2012

MORRISON & FOERSTER LLP

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4 By: /s/ Wesley E. Overson

WESLEY E. OVERSON

5 Attorneys for Defendants  
6 RESTORATION HARDWARE, INC.  
7 and GARY FRIEDMAN  
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